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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 39

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

vs.

COLUMBIA BROADCASTING SYSTEM
OF CALIFORNIA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED APRIL 2, 1940
CERTIORARI GRANTED MAY 6, 1940

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FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

1 In United States Court of Appeals for the District of Columbia

No. 7283

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION

[File endorsement omitted.]

Notice of appeal from the Decision of the Federal Communications Commission and statement of reasons therefor

Filed November 12, 1938

I

Notice of appeal

Now comes Columbia Broadcasting System of California, Inc., this 12th day of November 1938, and says that it is aggrieved and that its interests are adversely affected by a decision of the Federal Communications Commission rendered October 20, 1938, and ordered to be effective October 24, 1938, denying an application for a radio station license filed by it under and pursuant to the provisions of Section 310 (b) of the Communications Act of 1934.

Wherefore, appellant gives notice of its appeal therefrom to the United States Circuit Court of Appeals for the District of Columbia, and assigns the reasons hereinafter stated.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.,
By D. M. PATRICK,
By JOSEPH H. REAM,
Its Attorneys.

II

Reasons for appeal

Appellant is a corporation organized and existing under the laws of the State of California.

On the 8th day of August 1936, appellant filed with the Federal Communications Commission an application for a license to operate Radio Station KSFO, located in San Francisco, Cali-

2 fornia, and licensed by the Commission to operate upon the frequency 560 kilocycles with power of 1000 watts and unlimited hours of operation. The license to operate Station KSFO was then, and is now, outstanding in the name of a California corporation known as "The Associated Broadcasters, Inc.,"

and that company joined in appellant's application to the Commission for the license in question.

Appellant's application was filed under and pursuant to Section 310 (b) of the Communications Act of 1934 and as such is governed by that and related parts of the Act. The application was accompanied by the lease agreement between appellant and The Associated Broadcasters, Inc., which was to govern the transaction insofar as the individual parties thereto were concerned and was also accompanied by extensive data bearing upon the value and earnings of the property as well as other information on other subjects required in such cases by the Commission's rules and regulations.

Appellant's application was designated for hearing by the Commission upon the following issues:

1. To determine the legal, technical, financial, and other qualifications of the proposed assignee to continue the operation of the station;

2. To determine whether the application may be granted within the purview of Section 310 of the Communications Act of 1934;

3. To determine whether the granting of the application would serve public interest, convenience, and necessity.

The case was heard before an Examiner on December 2, 1936, who submitted a report on April 6, 1937, recommending that the application be denied. Exceptions to the Examiner's report were filed and pursuant to request therefor, oral argument upon the exceptions was had before the Broadcast Division of the Commission on July 1, 1937, and again after the abolition of the divisions of the Commission, before the Commission en banc, on January 14, 1938. The decision appealed from was rendered by the full Commission with Commissioner Brown concurring in the result with a separate opinion.

In rendering the decision and order appealed from, the Commission concluded that appellant is legally, financially, and otherwise qualified as the licensee of Station KSFO but that,

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since the lease agreement between the parties bound the appellant as lessee to make application for reassignment of the license to The Associated Broadcasters, Inc., as lessor upon expiration or termination of the lease, such agreement was "contrary to the Communications Act and not in the public interest" and the application could not be granted. In arriving at this decision, the Commission committed errors of law, both of substance and procedure, all of which aggrieved and adversely affected appellant and its interests.

III

Assignment of errors

1. The Commission erred in holding and deciding that the terms of the lease agreement between appellant and The Associated Broadcasters, Inc., and particularly the following:

"The Lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In the event that it is necessary that applications for operating licenses and/or other applications, petitions or procedural documents relating to the operation of Station KSFO be filed in the name of the Lessor, the Lessor will, at the request of the Lessee, file such applications, petitions or documents and will render such cooperation to the Lessee as may be appropriate to the subject matter. The Lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the Lessee in any action or proceeding involving the license properties of Station KSFO."

* * * * *

"The Lessee will make and duly prosecute due and proper application for the reassignment to the Lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the Lessee will, at the request of the Lessor, file and duly prosecute such applications, petitions, or documents and will render such cooperation to the Lessor as may be appropriate to the subject matter."

* * * * *

"The Lessee and/or its assigns hereby irrevocably appoints the Lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the Lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits, and other assignable contracts relating to KSFO to Lessor or its nominee."

provide "assurance to the Lessor of license renewals for Station KSFO and assurance of possesion in the Lessor of the license of said station existing at the termination of the lease," or is in any way in actual or apparent conflict with the Commission's jurisdiction over the subject matter conferred by the Communications Act of 1934.

2. The Commission erred in holding and deciding that said provisions of the lease agreement between appellant and The Associated Broadcasters, Inc., "are in conflict with provisions of the Communications Act and not in the public interest."

3. The Commission erred in holding and deciding that the granting of appellant's application "under the provisions of the lease agreement of June 26, 1936, between the parties, is contrary to Sections 309 (b) (1) and 310 (b) of the Communications Act of 1934."

4. The Commission erred in holding and deciding that the provisions of the lease agreement under which appellant proposes to operate station KSFO "precludes the finding that the assignment of the license would serve public interest, convenience, and necessity."

5. The Commission erred in holding and deciding that said provisions of the lease agreement between appellant and The Associated Broadcasters, Inc., were susceptible of the meaning attached to them or could, in view of the applicable provisions of the Communications Act of 1934, have the legal effects attributed to them in the following statement contained in the Commission's "Statement of Facts":

"Furthermore, the assignee of a station license operating under a lease-agreement which contains provisions reserving to the lessor assurance of station license renewals and the possession of the station license existing at the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public or cease to operate the station licensed."

6. The Commission erred in construing the provisions of the Communications Act of 1934 and particularly Sections 309 (b) (1) and 310 (b) thereof as conferring any jurisdiction upon it to pass upon the purely private or business phases of the lease agreement between appellant and The Associated Broad-
5 casters, Inc., and to grant or deny the application in question upon its conception of those considerations and without regard to the statutory standard established by the Act.

7. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that it is admittedly at variance with a well-known and long-established rule of adminis-

trative interpretation and decision established by it in applying the same provisions of the Act in similar cases.

8. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that the result reached is admittedly in direct opposition to that reached by applying the same provisions of law to similar facts in other cases decided by it.

9. The decision and order complained of is erroneous and in a legal sense arbitrary and capricious in that no point of law or fact is cited or relied upon to distinguish it from those cases in which the Commission states that an opposite result was reached by applying the same statutory provisions to "leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest."

10. The Commission erred in failing to find and report the basic or underlying facts necessary to support its ultimate finding to the effect that the granting of appellant's application "is not in the public interest."

11. The Commission erred in failing to give to its "Statement of Facts" the scope required by the issues involved and by the evidence adduced.

12. The findings and conclusions of the Commission are insufficient to support the decision rendered, do not fairly report and represent the evidence in the record, and do not set forth the basic facts from which the ultimate facts are to be deduced.

13. The Commission erred in failing to find and report the basic or underlying facts developed by the evidence and relating to each of the following subjects:

A. The history, financial condition, and performance of Station KSFO prior to the acquisition of the stock in The Associated Broadcasters, Inc., by the present owner in February 1933.

6 B. The history, financial condition, and performance of Station KSFO from February 1933 to June 26, 1936, the date of the lease agreement between appellant and The Associated Broadcasters, Inc.

C. The scope, character, and quality of the services now being rendered by Station KSFO.

D. The location, population, and relative importance of San Francisco; its importance from the standpoint of any company engaged in the business of network broadcasting; the facilities therein maintained by, and the stations located therein licensed to, its principal network competitor; and its particular importance to West Coast network operations during those periods of time when eastern and midwestern originating points have ceased operation, and stations in the Pacific and intermountain areas must be served from West Coast originating points.

E. Technical and other qualifications of appellant arising out of its relationship to and cooperation with Columbia Broadcasting System, Inc., which is engaged in the business of operating a national radio network, and now maintains an extensive staff of executives, artists, technicians, and other employees on the West Coast.

F. The history and development of the network operations of Columbia Broadcasting System, Inc., on the Pacific Coast; the changes which have been brought about in those operations due to changes in the industry; and the benefits which will accrue to the public, to Station KSFO, and to both parties to the lease agreement from the granting of appellant's application.

G. The steps which appellant proposed to take to improve the technical and program facilities now in use at Station KSFO, and the improvement in the scope, character, and quality of the service which will result to the public in the San Fran-
7 cisco area in the event its application is granted.

14. The Commission erred in finding and reporting that "The Columbia Broadcasting System proposes to broadcast approximately 1,650 hours a year of chain commercial programs, and about 500 hours a year of local broadcasting" and in failing to find in accordance with the evidence that an estimate of the ratio of all chain to all local programs to be carried by Station KSFO in the event that appellant's application is granted indicated that about 40% of the total programs, including both commercial and sustaining features, would be network programs, and about 60%, including both commercial and sustaining features, would be local programs.

15. The Commission erred in other particulars apparent from the record.

16. The Commission erred in denying appellant's application for a license.

IV

Review requested

Wherefore, the appellant prays an order reversing said decision and order of the Federal Communications Commission, and for such further relief as to this Honorable Court may seem just and proper.

COLUMBIA BROADCASTING
SYSTEM OF CALIFORNIA, INC.,
By D. M. PATRICK,
By JOSEPH H. REAM,
Its Attorneys.

Proof of service

Service of the foregoing "Notice of Appeal from a Decision of the Federal Communications Commission ,and Statement of Reasons Therefor," and receipt of a full, true, and correct copy is hereby acknowledged this 12th day of November 1938.

FEDERAL COMMUNICATIONS COMMISSION,
By JOHN B. REYNOLDS.

8 Before the Federal Communications Commission,
Washington, D. C.

Docket No. 4208

In the Matter of THE ASSOCIATED BROADCASTERS, INC., (KSFO), ASSIGNOR, and COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., ASSIGNEE, SAN FRANCISCO, CALIFORNIA, FOR CONSENT TO VOLUNTARY ASSIGNMENT OF LICENSE TO COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.

Decided October 18, 1938

D. M. Patrick and Joseph H. Reams on behalf of applicant; and George B. Porter and Frank U. Fletcher on behalf of the Commission.

Statement of facts, grounds for decision, and order

By the Commission: (Brown, Commissioner, concurring in result in separate opinion.)

Preliminary statement

The Associated Broadcasters, Inc., is a corporation organized and existing under the laws of the State of California. It is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco on the frequency 560 kc. with a power output of 1000 watts and unlimited hours of operation.

Western Broadcasting Company (now incorporated as Columbia Broadcasting System of California, Inc.) is a corporation organized and existing under the laws of California.

This proceeding arose upon the joint application of The Associated Broadcasters, Inc., licensee of Station KSFO, and Western Broadcasting Company (now known as Columbia Broadcasting System of California, Inc.) (5 B–R–27) as amended, for consent to assignment of radio station license to Columbia Broadcasting System of California, Inc.

9 The Commission was unable to determine from an examination of this application, as amended, that the granting thereof would serve public interest, convenience, and necessity, or that the same might be granted within the purview of Section 310 of the Communications Act of 1934 (48 Stat. 1086), and, accordingly, designated the same for a public hearing, of which due notice was given the applicant and other interested parties. Thereafter, and on December 2, 1936, in accordance with said notice, the hearing was held before an examiner, who, on April 6, 1937, submitted his report (I–399) recommending that the application be denied.

Exceptions to the Examiner's Report were filed and a request made for oral argument by Associated Broadcasters, Inc., Columbia Broadcasting System of California, Inc., and Columbia Broadcasting System, Inc. Oral argument was had before the Broadcast Division July 1, 1937, and again, before the Commission en banc, January 14, 1938.

The exceptions raise no questions not considered in a determination of this application upon its merits.

Statement of facts

The original cost of all equipment including antenna system, transmitting apparatus, and studio equipment of Station KSFO is $35,224.26. The transmitter and antenna are twelve or thirteen years old. The speech input equipment is six years old. The studio equipment was acquired in 1932. The present cost of equivalent equipment is $38,865.09. Depreciation of $8,733.13 was subtracted from the present cost of equivalent equipment, leaving a depreciated value of the property at $30,131.96.

Station KSFO is now and has been operating as an independent station, though the licensee at one time exchanged programs in an experimental hookup with KNX, Los Angeles, this arrangement being continued over a period of several months. Program schedules of KSFO of recent date show diversified headings, methods of production, and commercial sponsorship.

Net profit for the period of January 1 to June 30, 1936, is $867.65. The owner of the capital stock of licensee corporation drew $1,000.00 a month as salary from the station during the period of the statement submitted. Subsequent to June 30, 1936, the business showed an increase in profits of $1,000.00 to $1,500.00 per month.

Columbia Broadcasting System of California, Inc., is a subsidiary of Columbia Broadcasting System, Inc., of New York. None of the officers or directors of this corporation is an alien; and not more than one-fifth of the capital stock of said corporation is owned of record or voted by aliens or their representatives.

The assets of Western Broadcasting Company (now Columbia Broadcasting System of California) as of June 30, 1936, totalled $449,861.34. The net worth of that company as of that date was $301,808.20. The total assets of the Columbia Broadcasting System, Inc., and subsidiary companies as of July 25, 1936, was $10,748,331.29 and its net worth was $7,411,573.66. No new stock issue is contemplated. The transferee is qualified financially to continue the operation of Station KSFO.

In 1928 the Columbia System was a relatively small network of 16 stations on the eastern seaboard with some few outlets in the middle west but in no wise a coast-to-coast project. In order to extend the service of the network, arrangements were made with the Don Lee Broadcasting Company, which then operated three stations in California. The Don Lee organization has since acted as Columbia's West Coast representative, but this association is being terminated. As a matter of policy, the Columbia System is undertaking to do more and more of the detail work connected with the maintenance and operation of its West Coast stations. The geographical separation between the East and West Coasts, the difference in time zones, special requirements of advertisers in the centers of industry, and population on the West Coast and unique opportunities to obtain talent, particularly from the moving picture industry at Los Angeles, make it desirable to the Columbia System to have a West Coast organization.

The following stations are either owned or operated by Columbia Broadcasting System, Inc., directly, or through the agency of subsidiaries:

Call letters	Address	Frequency	Power
WABC-WBOQ	New York, N. Y.	860	50 kw.
WJSV	Washington, D. C.	1460	10 kw.
WBT	Charlotte, N. C.	1080	50 kw.
WKRC	Cincinnati, Ohio	550	1 kw, 5 kw-LS.
KMOX	St. Louis, Missouri	1090	50 kw.
WBBM	Chicago, Ill.	770	50 kw.
WCCO	Minneapolis, Minn.	810	50 kw.
KNX	Los Angeles, Calif.	1050	50 kw.

Station WEEI (590 kc., 1 kw.) Boston, Massachusetts, is operated by the same interests under a lease agreement.

Columbia Broadcasting System, Inc., plans to acquire the licenses of all stations operated through the instrumentality of its subsidiaries and that plan would include Station KSFO. Proposed plans include organization of and arranging for the establishment of offices in California with various departments which go to make up the service part of the broadcast net work including sales, production, engineering, sales promotion, artists, and publicity. Additional physical facilities and personnel necessary to organize and broadcast products of a high standard over radio Station KSFO

would be provided. The transferee is technically qualified to continue the operation of Station KSFO.

The transferee proposes to increase the basic rates of Station KSFO from $150 to $325 an hour. Based upon this increase in basic rates, estimates of the earning ability and possibilities of the station as a network unit were given as follows:

11	Estimated gross revenue	$280,000 per year
	Expenses, including rent and depreciation on a new transmitter	250,000
	Estimated net income	30,000 per year

Further plans of the assignee, Columbia Broadcasting System of California, Inc., include putting in new equipment (the present transmitter is to be used as an emergency auxiliary transmitter), changing the site of the present transmitter, and establishing studio and office facilities for not only local headquarters but also Columbia headquarters. The present studio is to be used for a while, depending on where larger studios will be located. In other words, they plan to "revitalize the entire plant by putting in new equipment and everything that goes with it at a new location."

At the present time Station KFRC is carrying the programs of the Columbia Broadcasting System. The plan of the Columbia System is that Station KSFO will displace KFRC, and KSFO will be the only station carrying Columbia programs in San Francisco. The Columbia System proposes to broadcast approximately 1,650 hours a year of chain commercial programs and about 500 hours a year of local broadcasts.

Mr. W. I. Dunn, President of Associated Broadcasters, Inc., first interviewed officials of the Columbia Broadcasting System, Inc., in 1935, with the suggestion that Station KSFO be placed upon the Columbia Network and that the station be leased to Columbia. This original suggestion led to further negotiations between the parties which ultimately resulted in the execution of a lease-agreement. The agreement is dated June 26, 1936. The parties have made the agreement and an executed assignment of the station license a part of this record. The documents are required by the Rules and Regulations of the Commission to be filed with applications seeking authorization for the transfer of a station license. It is incumbent upon the Commission that it examine the lease-agreement and determine whether the provisions therein are fully within the Communications Act and not contrary to the public interest.

The expiration date of the agreement is fixed as January 1, 1942, subject, however, to the right of the lessee to successive renewals thereof for a period of five years each; the last renewal period not to extend beyond January 1, 1952.

The agreement contains a number of provisions pertaining to the equipment and other properties of the station. These provisions merely protect the property rights of the lessor and need not here be further considered. The agreement also contains provisions relating to the license renewals of the station and the future disposition thereof, and such provisions must be carefully scrutinized for the reasons heretofore stated. The provisions of the lease-agreement referred to are as follows:

"The Lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In
12 the event that it is necessary that applications for operating licenses and/or other applications, petitions or procedural documents relating to the operation of Station KSFO be filed in the name of the Lessor, the Lessor will, at the request of the Lessee, file such applications, petitions or documents and will render such cooperation to the Lessee as may be appropriate to the subject matter. The Lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the Lessee in any action or proceeding involving the license or properties of Station KSFO."

* * * * *

"The Lessee will make and duly prosecute due and proper application for the reassignment to the Lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the Lessee will, at the request of the Lessor, file and duly prosecute such applications, petitions, or documents and will render such cooperation to the Lessor as may be appropriate to the subject matter."

This agreement also contains a provision setting forth many contingencies upon which the lessor may re-enter and take possession of the leased property without legal process and without being guilty of trespass. Thereupon, the provision mentioned continues as follows:

"The Lessor and/or its assigns hereby irrevocably appoints the Lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the Lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits, and other assignable contracts relating to KSFO to Lessor or its nominee."

The foregoing shows: (1) that although the lessor proposes to assign its license it claims and reserves the right to employ counsel and to enter into any action or proceeding involving the license to operate Station KSFO; (2) that the lessor binds the lessee to make "application for reassignment to the lessor of all

operating licenses and permits required for the operation of Station KSFO at any termination of this lease"; and (3) that in case of default in the performance of the contract by the lessee the lessor may under power of attorney embodied in the contract, acting in the name of the lessee, assign to itself (the lessor) "all licenses, permits, and other assignable contracts relating to KSFO."

More specifically, the above lease provisions represent: (1) that the lessor is to be protected in the issuance of station license renewals during the period of the agreement; and (2) that the lessor is assured the possession of station license existing at the time the lease terminates.

13 The Communications Act of 1934 provides that a "station license shall not vest in the licensee any right * * * in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein" (Section 309 (b) (1)).

A broadcast station license is issued for a term of six months. The license is a personal privilege and not transferable without the consent of this Commission. The licensee has a continuing right to apply at proper times for successive renewals of his license. (Technical Radio Laboratory v. Federal Radio Commission, 36 F. (2d) 111, 113.) In the present case, should the license for Station KSFO issue to the proposed assignee the assignor could have no continuing right in applying for renewals of said station license; nor could the assignor have any right in the station license existing at the time of the expiration of the lease. To recognize such a right in the assignor would be tantamount to the recognition of an outsider to the use of a frequency at a future time.

Furthermore, the assignee of a station license operating under a lease-agreement which contains provisions reserving to the lessor assurance of station license renewals and the possession of the station license existing at the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public or cease to operate the station licensed.

Prior to the enactment of the Communications Act, the Federal Radio Commission authorized the M. A. Leese Radio Corporation to assign its license for radio Station WMAL to the National Broadcasting Company, Inc. At the time of assignment of the

station license the National Broadcasting Company, Inc., executed a lease-agreement with the owners of Station WMAL which contains provisions assuring the lessor of license renewals and possession of the license that exists at the time the lease terminates. These provisions are similar to the provisions contained in the lease-agreement between the parties herein.

The Federal Communications Commission on April 20, 1938, in a per curiam opinion relating to the transfer of stock of the M. A. Leese Radio Corporation to The Evening Star Newspaper Company, stated its position as to the above provisions of the lease arrangement between the M. A. Leese Radio Corporation and the National Broadcasting Company as follows:

"And it appearing that the transfer of control of M. A. Leese Radio Corporation does not directly involve a transfer of a station license, the frequencies authorized to be used by the licensee, or the rights therein granted, for the reason that M. A. Leese Radio
14 Corporation does not have any such rights to transfer, having heretofore assigned the license of Station WMAL, including the frequencies and all the rights therein granted, to the National Broadcasting Company; and that since said transfer this Commission has granted renewals of said license, no reasons for failure to renew having been made to appear, to the National Broadcasting Company;

"And it appearing that upon the expiration of the lease between said M. A. Leese Radio Corporation and the National Broadcasting Company, Inc., neither the license nor any rights therein will revert to the M. A. Leese Radio Corporation of its assignees, or The Evening Star Newspaper Company as a stockholder therein;

"And it appearing that the assignment of license from the said M. A. Leese Radio Corporation to National Broadcasting Company pursuant to the lease agreement did not, could not, and does not operate as approval of or consent to the terms of said agreement as such, nor is it in any wise an acceptance or recognition of any rights, equities or priorities of the M. A. Leese Radio Corporation, or its assignees, or any of the stockholders thereof so far as the license of broadcast Station WMAL is concerned."

This Commission now finds that lease provisions assuring the lessor of renewals of license, and/or assuring the lessor of the possession of the station license existing at the termination of the lease, are contrary to the Communications Act and are not in the public interest.

This Commission and its predecessor (Federal Radio Commission), previous to this decision, has granted (without written opinion) authority for the assignment of licenses based on leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest. In approv-

ing these assignments the Commission accepted the lessee as one stepping into the shoes of the lessor with the same privileges and responsibilities; and it was the opinion of the Commission that its approval of an assignment did not carry with it approval of the provisions of the lease beyond the mere transfer of the license. Experience has shown, however, that this construction may mislead the public in general, as well as the parties to the lease agreements.

In the case of M. A. Leese Radio Corporation, supra, this Commission without the lessee before it, gave notice that no station license privileges would be recognized in the "M. A. Leese Radio Corporation, or its assigns, or any of the stockholders thereof." This was tantamount to saying that provisions in the lease under which the National Broadcasting Company operates Station WMAL, assuring the lessor of station license renewals and the possession of the station license existing at the time the lease terminates, could not, and would not be binding upon the Commission. If any action of this Commission or action of its predecessor, the Federal Radio Commission, in granting an assignment of a station license, may be construed as an approval of lease provisions, assuring the lessor of station license renewals and/or the possession of the license existing at the termination of the lease, then to that extent said actions are hereby overruled.

Grounds for decision

On the record in this case the Commission finds:

1. The provisions of the lease-agreement between the applicants herein, providing assurance to the lessor of license renewals for Station KSFO and assurance of possession in the lessor of the license of said station existing at the termination of the lease, are in conflict with provisions of the Communications Act and not in the public interest;

2. A grant of the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to assign the license of Station KSFO under the provisions of the lease-agreement of June 26, 1936, between said parties, is contrary to Sections 309 (b) (1) and 310 (b) of the Communications Act of 1934;

3. The proposed transferee is legally, financially, and otherwise qualified as a licensee of Station KSFO but the provisions of the lease-agreement under which it would operate said station, assuring the transferor license renewals and the possession of the existing station license at the termination of the lease precludes the finding that the assignment of the license would serve public interest, convenience, and necessity.

4. A grant of the joint application of The Associated Broadcasters, Inc., and the Columbia Broadcasting System of California, Inc., for consent to assign the license to Station KSFO is not in the public interest.

Order

Upon consideration of the entire record, it is ordered:

That the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to voluntary assignment of license of Station KSFO to Columbia Broadcasting System of California, Inc. (Docket No. 4208), be, and it is hereby, denied.

This Order shall become effective at 3:00 a. m., E. S. T., on the 24th day of October 1938.

FEDERAL COMMUNICATIONS COMMISSION.
T. J. SLOWIE, *Secretary.*

Date released: October 20, 1938.

16 *Concurring opinion*

BROWN, Commissioner, concurring.

I concur with the result reached by the majority of the Commission in this case, but I cannot subscribe to the reasons advanced by them for denial of the application.

The majority have advanced for the first time the opinion that a contract of lease, which binds the lessee to make application for reassignment of the license to the lessor upon the expiration of the lease, is "contrary to the Communications Act and not in the public interest."

Section 301 of the Act provides:

"* * * No person shall use or operate any apparatus for the transmission of * * * communications * * * by radio * * *, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

In making application to this Commission for a license, an applicant has the burden of showing that he has possession of and the right, without restriction, to use or operate certain described apparatus for the period of the license applied for. The license period is fixed at six months by regulation and this Commission may not grant a license for a period in excess of three years (Section 307 (d)). Ownership of equipment is not required. It is sufficient if an applicant shows that he is in possession of certain equipment by virtue of a lease, sale, or other arrangement and that he will be in possession of such equipment during the term of the license. This, certainly, the applicant in this case had demonstrated.

Sections 301 and 309 (b) (1) prevent the assertion by a licensee of any right in the license beyond its terms. The holding of a license may not vest in the licensee any right to operate the station or any right to the use of the frequencies designated beyond the terms and conditions of such license. And Section 310 (b) prevents the transfer of a license without Commission consent in writing. The parties in this case have agreed to make application for reassignment of the license to the lessor upon termination of the lease. In one sense they have attempted to determine the right to use the frequency as between themselves. But certainly this assertion would have no effect upon the power of the Commission. As to this Commission and its powers and duties under the Communications Act, the provision must be simply a nullity.

I am unable to see how the granting of consent to the assignment of license as proposed could possibly be construed as an approval of a thing which the law (Sections 301 and 309) specifically negatives. Even if it be assumed that the parties have asserted a right as against the Commission, we cannot by our action repeal the express provisions of the statute.

Moreover, Sections 303, 308, 309, 312, and others of the Communications Act confer upon this Commission broad regula-
17 tory powers with respect to the original issuance or subsequent modification, revocation, or renewal of licenses. These broad powers are specific and they recognize that in the interest of the public the Commission may at any time, upon sufficient reason being shown, modify, revoke, or refuse a license. Again, we may not by our action repeal these provisions of the statute.

Section 310 (b) of the Federal Communications Act of 1934 governs the transfer of licenses:

"(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted *shall not be transferred, assigned*, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer or control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing." [Italics supplied.]

The public interest, therefore, is the standard we must apply in this case. I fail to follow the reasoning of the majority that the reversionary provision in the lease is per se contrary to the public interest. It is difficult to see how the public in this case would be harmed by the fact that the proposed assignee would operate his station with equipment leased rather than purchased. The public is interested in the continued operation of the station and the con-

tinued improvement of its technical service and programs, but unless such are jeopardized by some provision of the instrument of conveyance, the exact form whether lease, sale, or gift, is unimportant. Where a fact appearing in the record has no reasonable or proximate effect upon the programs or service of the station, the public interest is not concerned.

There are aspects of this case other than those assigned by the majority because of which I concur in the denial of the application. The sole test is whether the granting of the instant application would serve the public interest. From the record, I am unable to find that any benefit whatever would be derived by the public if this application be granted. The public will have the benefit of the present programs carried by Station KSFO and in addition will not be denied Columbia Broadcasting System's programs, which are now being carried by Station KFRC. I am, therefore, content in this case to ground my decision upon the fact that the applicant has failed to show sufficient reasons in the public interest to warrant the granting of this application.

18 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Motion to dismiss

Filed December 14, 1938

Now comes the appellee in the above-entitled cause and respectfully moves the court to dismiss this appeal on the ground that this court is without jurisdiction to entertain the same.

Wherefore, the Federal Communications Commission prays that this court enter its order dismissing this appeal.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
W. H. B.
Acting General Counsel.
W. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

19 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Statement and brief in support of appellee's motion to dismiss

Filed December 14, 1938

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

Statement of decision appealed from

The Associated Broadcasters, Inc., is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco, California. On August 8, 1936, the Columbia Broadcasting System of California, Inc. (the appellant herein), and The Associated Broadcasters, Inc. (licensee of Station KSFO), filed their joint application with the Federal Communications Commission seeking its "consent in writing," pursuant to Section 310 (b)[1] of the Communications Act of 1934 for the voluntary assignment of the radio station license held by The Associated Broadcasters, Inc., for Station KSFO to the appellant. The application was duly heard and on October 18, 1938, the Commission entered its Order, effective October 24, 1938, denying said application.

Ground for motion

The ground for this motion is that this court has no jurisdiction to entertain the proposed appeal for the reason that it is
20 based upon an Order of the Federal Communications Commission from which no appeal is provided under Section 402 (b) of the Communications Act of 1934.

ARGUMENT

I

The right of appeal from any decision of the Commission to this court is purely statutory and the terms of the statute must be strictly followed

This court has consistently held that the right of appeal from a Commission decision is purely statutory and that the terms of the statute must be strictly followed. Pittsburgh Radio Supply House v. Federal Communications Commission, 98 F. (2d) 303

[1] "SEC. 310 (b). The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing" (48 Stat. 1086).

(1938); Pote (Station WLOE) v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933) cert. denied 290 U. S. 680 (1933), "The right of appeal being a statutory one, the Court cannot dispense with its express provisions, even to the extent of doing equity." Universal Service Wireless, Inc. v. Federal Radio Commission, 59 App. D. C. 319, 41 F. (2d) 113 (1930) and cases cited.

II

Section 402 (b) of the Communications Act of 1934 does not provide for a review of an order of the Commission denying an application for the asignment of a radio station license

Section 402 (b) of the Communications Act of 1934 provides as follows:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission" (50 Stat. 197).

21 On June 19, 1933, this court in the case of William S. Pote (Station WLOE) v. Federal Radio Commission, supra, dismissed an appeal based upon an Order of the Federal Radio Commission denying an application for the involuntary assignment of a radio station license. Pote based his right of appeal to this court on Section 16 of the Radio Act of 1927, as amended July 1, 1930 (46 Stat. 844).[2] The provisions of Section 402 (b) of the Communications Act of 1934, so far as an appeal to this court from an order of the Federal Communications Commission denying the transfer or assignment of a radio station license is concerned, are not different in any way from the provisions of Section 16 of the Radio Act of 1927, as amended July 1, 1930, with respect to an appeal from a similar order of the

[2] Section 16 of the Act of July 1, 1930, reads as follows:

"SEC. 16. (a) An appeal may be taken in the manner hereinafter provided from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the Commission.

"(2) By any licensee whose license is revoked, modified, or suspended by the Commission.

"(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the Commission, granting or refusing any such application or by any decision of the Commission revoking, modifying, or suspending an existing station license * * *" (46 Stat. 844).

Federal Radio Commission. Therefore, this court's language in its decision dismissing the Pote appeal becomes fully applicable to the case at bar. The pertinent passages of the decision follow:

"On February 9, 1932, the Commission filed in this court a motion to dismiss the appeal upon the ground that a right of appeal in such case is not granted by Section 16 of the Radio Act of 1927, as amended July 1, 1930 (46 Stat. 844), which provides for appeals from the Commission to this court. Action on this motion was deferred by the court until consideration of the case in its order.

22 "In our opinion the motion of the Commission to dismiss the appeal should be sustained. Section 12 of the Radio Act of 1927 (44 Stat. 1162) provides in part:

"* * * The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority." * * * [The Court here quoted Sec. 16 set forth above.]

"It thus appears that no provision for an appeal from a refusal to permit an assignment of a broadcasting license is included either specifically or impliedly within the controlling section above quoted. * * *"

Since the dismissal of the Pote case this court has heard no appeal based upon an order of either the Federal Radio Commission or the Federal Communications Commission denying an application for the assignment of a radio station license.

Moreover, the appeal section (402 (b)) of the Communications Act of 1934 was enacted subsequent to this court's decision in the Pote case and Congress did not see fit to extend the right of appeal from an order of the Commission denying an application for assignment of a radio station license.

For the foregoing reasons it is respectfully submitted that the court lacks jurisdiction to entertain the appeal herein and, accordingly, it should be dismissed.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
W. H. B.
William J. Dempsey,
Acting General Counsel.
W. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

23 *Notice*

To Mr. D. M. PATRICK, *Attorney for the Appellant:*

Please take notice that the foregoing Motion to Dismiss your Appeal, Statement of Decision Appealed From and Grounds for Motion, has been filed this day.

WILLIAM J. DEMPSEY,
W. H. B.
William J. Dempsey,
Acting General Counsel,
Federal Communications Commission.

Acknowledgment of service

Service of a true copy of the foregoing Motion to Dismiss, Statement of Decision Appealed From and Grounds for Motion is hereby acknowledged and a copy thereof received this 14th day of December 1938.

D. M. PATRICK,
Counsel for Appellant.

24 [File endorsement omitted.]

25 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Opposition to motion to dismiss and request for oral argument thereon

Filed December 16, 1938

Now comes the appellant in the above-entitled cause and in opposition to the "Motion to Dismiss" filed by the Federal Communications Commission on December 14, 1938, submits the points and authorities relied upon by it and requests that an opportunity be given for oral argument thereon.

D. M. PATRICK,
Attorney for Columbia Broadcasting System of California, Appellant.

26 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Points and authorities in opposition to motion to dismiss

Filed December 16, 1938

1. An application such as that filed by appellant and denied by the Commission's order of October 18, 1938 (effective October 24, 1938) is in legal effect and in fact an application for a radio station license within the meaning of Section 402 (b) of the Communications Act of 1934, regardless of the name or title attached by the Commission to the application form or to the proceeding.

See Sections 310 (b) and 402 (b) of the Communications Act of 1934.

2. There is nothing in Section 310 (b) or elsewhere in the Communications Act which requires that "joint application" be made to the Commission by the applicant and by one who holds the license in cases of this character. The application form used and the procedure employed before the Commission as a convenience to it in "securing full information" pursuant to the mandate of the statute cannot be held to be determinative as to the inherent nature of the proceeding or the right of an applicant in such proceeding to secure a judicial review of the decision rendered by the Commission.

Goss vs. F. R. C., 62 Appeals D. C. 301, 67 F. (2d) 507.

Pacific Development Radio Company vs. F. R. C., 60 App. D. C. 378, 55 F. (2d) 540.

3. The right to make application to the Commission for the license to operate an existing station then held by another is in all respects of the same origin, dignity, and validity as the right to make application to the Commission for a license for a new station, and the standard which must control the Commission's determination in both cases is necessarily the same.

27 Don Lee Broadcasting System vs. F. C. C., 76 F. (2d) 998, 1000.

Compare Sections 310 (b), 309, and 319 of the Communications Act of 1934.

4. To hold that decisions of the Commission on applications arising under Section 310 (b) are not subject to judicial review under Section 402 (b) and that decisions on applications of a similar nature arising under Sections 309 and 319 are subject to such review requires doing violence to the language as well as the purpose of Section 402 (b). The literal words of a statute are to be read in the light of the purpose of the statute taken as

a whole and a literal meaning should not be followed where it appears that such an interpretation would, in view of the purpose of the statute, lead to an absurd or unjust result.

Saginaw Broadcasting Company vs. F. C. C., 96 F. (2d) 544, 588 and cases cited, Goss vs. F. R. C., supra, Pacific Development Radio Company vs. F. R. C., supra.

5. Statements in the opinions of this Court to the effect that the right of appeal from a Commission decision is purely statutory and that compliance with the provisions of such a statute cannot be dispensed with even to the extent of doing equity must be interpreted in the light of the question then decided and not as authority for a proposition at variance with other and recognized rules of interpretation and construction. There is nothing in the cases of Pittsburgh Radio Supply House vs. F. C. C., 98 F. (2d) 303 and Universal Service Wireless, Inc., vs. F. R. C., 59 App. D. C. 319, which compels or, when properly understood, even suggests the necessity for sustaining the Motion to Dismiss the present appeal.

6. The case of Pote vs. F. R. C., 62 App. D. C. 303, 67 F. (2d) 509, relied upon by the Commission is distinguishable from the present case in that it arose under Section 12 of the Radio Act of 1927, which did not clearly state, as does Section 310 (b) of the Communications Act, that the Commission was authorized and directed to make the same type of inquiry and determination in all cases where application is made for a license whether the same be for a new license or for a license then outstanding. In
28 fact, there is language in the majority opinion which indicates that Section 12 of the Radio Act of 1927 was considered merely as a prohibitory measure, designed to prevent the accomplishment of an illegal or undesirable act and which could and should be enforced administratively, rather than as a measure to be employed in accomplishing a desirable result and which should be administered by judicial or quasi judicial process, as is clearly the case with Section 310 (b).

7. In any event, the case of Pote vs. F. R. C., supra, cannot be taken as representing the unqualified and final position of this Court on the principle of statutory construction here involved in view of the fact that in other cases, appeals were entertained involving applications for a construction permit where such type of application was specified in the Act itself, and where the section of the Act authorizing appeals in certain cases did not specificially mention appeals from Commission decisions on this type of application. In those cases, the purpose and legal effect of the statute, and the application in question rather than the literal words employed were determined to be controlling.

Pacific Development Radio Company vs. F. R. C., supra.

Goss vs. F. R. C., supra.

8. Congress clearly intended that Commission decisions in cases arising under Section 310 (b) should not be immune to judicial review, regardless of the result reached and the basis therefor. A refusal to entertain jurisdiction in the present appeal by attaching importance only to the literal words of the statute, rather than to its purpose, would require appellant and others similarly situated to proceed first under Section 402 (a) with an ultimate appeal to this Court from the judgment of the District Court. Such procedure would seem to be not only undesirable, but unnecessary in view of the basic similarity in the nature of the proceeding wherever the same is instituted.

Red River Broadcasting Company vs. F. C. C., 98 F. (2d) 282.
F. R. C. vs. Nelson Brothers Company, 289 U. S. 266, 277.

Respectfully submitted.

D. M. PATRICK,
Attorney for Columbia Broadcasting System of California, Inc., Appellant.

29 *Acknowledgment of service*

Service of a true copy of the foregoing "Opposition to Motion to Dismiss" and "Points and Authorities," in support thereof is hereby acknowledged and a copy thereof received this — day of December 1938.

FEDERAL COMMUNICATIONS COMMISSION.
By ——— ———.

30 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Appellee's reply to appellant's "opposition to motion to dismiss and request for oral argument thereon"

Filed December 19, 1938

To the Honorable, the Chief Justice, and the Associate Justices of the United States Court of Appeals for the District of Columbia:

I

Appellant, Columbia Broadcasting System of California, Inc., on December 16, 1938, filed "Points and Authorities" in support of its opposition to Commission's Motion to Dismiss. On December 17, 1938, an identical memorandum was submitted by Appellant, The Associated Broadcasters, Inc. (No. 7282), in sup-

port of its opposition to Commission's Motion to Dismiss. In Appellants' "Points and Authorities" the argument is made that an application for an assignment of license under Section 310 (b) of the Communications Act is "in legal substance and in fact" an application for a radio station license within the meaning of Section 402 (b) of the Act. Appellants make the amazing statement that the Pote case "cannot be taken as representing the unqualified and final position of this Court on the principle of statutory construction here involved," and rely upon the case of Goss v. Federal Radio Commission, 62 App. D. C. 301; 67 Fed. (2d) 507, for the argument that the literal meaning of the statute should not be followed to deprive them of an appeal to this Court in the instant case. They seemingly overlook the fact that the Goss case, supra, was decided by this Court on the same day as it decided the Pote case.

In the Goss case, this Court held that an application for a construction permit was, in substance and effect, an application for a station license, and allowed an appeal to lie to this Court under Section 16 of the Radio Act of 1927 from the denial of such an application. But in the Pote case, decided on the same
31 day, this Court refused to entertain an appeal from an order of the Commission denying an application for a transfer of license and, although the argument was made that such an application was in effect an application for a station license (see dissenting opinion of Justice Groner), this Court dismissed the appeal for want of jurisdiction. After the decisions of this Court in the Goss and Pote cases, the Communications Act of 1934 was passed. Congress added to the appeal provisions of the statute language specifically granting an appeal to this Court from a denial of a construction permit, but omitted from the 1934 Act, as it had omitted from previous statutes, any provision for an appeal to this Court from a denial of an application for a transfer of license.

The enactment in 1934 of Section 402 (b) of the Communications Act, without providing for an appeal to this Court from an order denying a transfer or assignment of license, in the face of the decision in the Pote case in 1933, was equivalent to an affirmative declaration by Congress that it did not intend to provide the same type of appeal from a denial of an application for an assignment or transfer of license as it provided for an appeal from a denial of a station license.

II

Appellants further argue that the Communications Act of 1934 contemplates an appeal from an order denying an application for transfer of license because, under Section 310 (b) of that Act, such an application is treated in a judicial or quasi-judicial manner in

contrast with the manner of treatment of such applications under Section 12 of the Radio Act of 1927, which applicant characterizes "merely as a prohibitory measure, designed to prevent the accomplishment of an illegal or undesirable Act and which could and should be enforced administratively rather than as a measure to be employed in accomplishing a desirable result and which should be administered by judicial or quasi-judicial process, as is clearly the case with Section 310 (b)." It is difficult to see any relationship whatsoever between the manner prescribed in the statute for handling applications for transfer of license before the Commission, and the question of whether Section 402 (b) permits a special review by this Court of Commission action on such applications. However, assuming arguendo that some such relationship may exist, a comparison of Section 309 (a) and Section 310 (b)
32 of the Communications Act of 1934 reveals that whereas Section 309 (a) provides in substance that no application for station license or for the renewal or modification of a station license can be denied without a hearing, Section 310 (b) prohibits a transfer or assignment of license "unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing," and makes no requirement whatsoever that an applicant for such a transfer be given a hearing in any case.

Thus, a comparison of the two sections demonstrates that Congress did not intend that the Commission should adopt the same administrative procedure in passing upon an application for a transfer or assignment of license as Congress prescribed for passing upon applications for station licenses. The holding of a hearing in the instant case as a means of "securing full information" was not required by the statute but was wholly discretionary with the Commission. Obviously, there is no merit in the appellants' contention that an appeal lies to this Court merely because the procedure followed by the Commission in this case coincided with the procedure provided by the Statute for other types of cases.

The difference in the Commission procedure and judicial review which Congress provided for applications for new license from that provided for applications for approval of transfer of license is undoubtedly explained by the fundamental difference between the two types of applications. In the usual case, an application under Section 310 (b) for approval of an assignment for transfer of license is made to the Commission after the proposed assignee or transferee has successfully negotiated with the holder of a station license for the voluntary assignment or transfer of the license, and he comes jointly with such licensee to request Commission approval of the transaction. This is quite different from the situation where one applies to the Commission for the facilities held by another without the consent of the existing licensee (see Fed-

eral Radio Commission v. Nelson Bros. Co., 289 U. S. 266). In the latter case, which is in fact an application for a station license, it is incumbent upon the applicant to show that the public interest, convenience and necessity would be served by the granting
33 of such facilities to him rather than by permitting them to remain in the hands of the existing licensee, and presents an essentially different situation from the one in which the applicant has obtained the agreement of the existing licensee to transfer or assign the facilities.

III

Appellants' last argument is based upon an entirely erroneous construction of the provisions of the Act of October 22, 1913. Any appeal taken under the provisions of that statute for the purpose of suspending, restraining the enforcement, operation or execution of, or to set aside in whole or in part any order made by the Commission must be heard and determined by a statutory three-judge District court with a direct appeal to the Supreme Court of the United States. Appellants apparently overlooked that, except in those few types of cases specifically mentioned in Section 402 (b) of the Communications Act of 1934, all other types of cases are reviewed not by this Court but by a three-judge statutory court under the provisions of the Act of October 22, 1913. Appellants' argument, therefore, that a dismissal of this case would result in an undesirable preliminary step consisting of the resort to a District court to be followed by an appeal to this court is wholly without basis.

The Commission has no objection to oral argument in this case.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.
WM. H. BAUER,
William H. Bauer,
Assistant Counsel.
ANDREW G. HALEY,
Andrew G. Haley,
Assistant Counsel.

34 *Acknowledgment of service*

Service of a true copy of the foregoing Appellee's Reply to Appellant's "Opposition to Motion To Dismiss and Request for Oral Argument Thereon" is hereby acknowledged and a copy thereof received this — day of December 1938.

D. M. PATRICK,
Counsel for Appellant.

35 [File endorsement omitted.]

33 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion for determination of jurisdictional question prior to consideration of cause upon the merits

Filed December 16, 1938

Now comes the appellant in the above-entitled cause and represents to this Honorable Court as follows:

1. That the above-entitled cause is an appeal taken from a decision and order of the Federal Communications Commission on November 12, 1938, pursuant to Section 402 (b) of the Communications Act of 1934. That the decision and order appealed from was one denying appellant's application for a license to operate Radio Station KSFO, which said license is now, and was then, outstanding in the name of The Associated Broadcasters, Inc.

2. That on December 13, 1938, and pursuant to the requirements of Section 402 (b) of the Act, Commission filed with this Honorable Court its "Statement of Facts, Grounds for Decision and Order" and the record upon which its said decision and order is based. That under the rules of this Court, appellant has a period of six days from the filing of said documents within which to file its designation specifying those portions of the record which it desires be printed and incorporated in the final record on appeal.

3. That on December 14, 1938, the Commission filed a motion to dismiss said appeal upon the ground that the decision and order in question is not appealable under section 402 (b) of the Communications Act; that on December 16, 1938, your appellant filed its opposition to said motion to dismiss, together with points and authorities relied upon by it; and that said motion to dismiss together with appellant's opposition thereto are now pending and undecided.

37 4. That said motion to dismiss and appellant's said opposition thereto involve primarily a question of law in the light of certain facts, which are not in dispute and which are fully developed by documents now on file with this Honorable Court as aforesaid. That the designation, preparation, and printing of the record in said cause will involve considerable time, effort, and expense, all of which will be rendered useless and of no value in the event that it is determined that this Court has no jurisdiction to entertain said appeal.

Wherefore, the premises considered, appellant respectfully prays:

1. That the Commission's motion to dismiss and appellant's opposition thereto be considered, and the question of jurisdiction presented thereby be determined prior to consideration of said cause upon the merits.

2. That pending consideration and determination of said question of jurisdiction, the requirements of the rules of this Court relative to the designation, preparation, and printing of the record in said cause be held in abeyance.

D. M. PATRICK,
Attorney for Columbia Broadcasting System of California, Inc., Appellant.

Consented to as to relief requested.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY, *General Counsel.*

38 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order granting motion for determination of jurisdictional question, etc.

December 29, 1938

On consideration of the motion to hold in abeyance the designating of the record, etc., herein, until after action on the motion to dismiss, it is ordered by the Court that the motion be, and it is hereby, granted.

39 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order setting motion to dismiss for argument

February 4, 1939

On consideration of the motion to dismiss filed herein, it is ordered by the Court that the motion be, and it is hereby, assigned for argument on the March Calendar with No. 7282.

40 In United States Court of Appeals for the District of Columbia

No. 7282

THE ASSOCIATED BROADCASTERS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 7283

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeals from the Federal Communications Commission

Decided November 29, 1939

E. Stuart Sprague, of New York City, for appellant in No. 7282.

D. M. Patrick, of Washington, D. C., for appellant in No. 7283.

William J. Dempsey, Acting General Counsel, Wm. H. Bauer, Acting Assistant General Counsel, Andrew G. Haley, and William C. Koplovitz, all of the Federal Communications Commission, for appellee.

Before GRONER, Chief Justice, and STEPHENS and MILLER, Associate Justices.

Opinion

MILLER, Associate Justice: The Associated Broadcasters, Inc., appellant in No. 7282, is licensed to operate a radio station known by the call letters KSFO in the City of San Francisco, California. Desiring to assign its radio station license to Columbia Broadcasting System of California, Inc., appellant in No. 7283, Associated joined with Columbia in filing an application with the Federal Communications Commission, seeking the consent of the latter—pursuant to Section 310 (b) of the Communications Act [3]—for the voluntary assignment of its license. The application was heard and denied by the Commission. From its order, effective October 24, 1938, Associated and Columbia filed separate appeals.

[3] 48 Stat. 1086, 47 U. S. C. A. § 310 (b) (Supp. 1938): "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

The Commission moved to dismiss each appeal on the ground that Section 402 (b) gives this court no jurisdiction to entertain them.[4] The motions were argued together and will be considered together.

41 If Columbia had filed an application for a station license, requesting therein the same facilities as are now enjoyed by Station KSFO, denial of the application would, without question, have brought the applicant within the language of Section 402 (b). The practical result of the Commission's contention, then, is that by arranging for an assignment, frankly revealing the arrangement to the Commission, and complying in every possible way with the statutory requirements governing assignments,[5] Columbia has deprived itself of a right of judicial review, which it would clearly have possessed if its application had been an outright request for the facilities of another station. This is not a sensible result and could not have been the intention of the statute.

In Pote v. Federal Radio Comm.,[6] a case involving circumstances similar in many respects to those involved in No. 7283, this court decided that a transferee who applied for an assignment of a radio station license had no right of appeal from an order of the Commission denying his application. In No. 7282 the applicant is the transferor and hence the Pote case is clearly distinguishable on that ground. And it is distinguishable, also, from No. 7283 in at least one important respect. In the Pote case the right of appeal was considered in the light of Section 12 of the Radio Act,[7] while here it must be considered in the light of Section 310 (b) of the Communications Act, which contains significant language not contained in Section 12 of the Radio Act, as indicated by italics in the following quotation: "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing."

Whatever may have been the proper interpretation of the old Section 12, and however justified may have been the decision in

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[4] 48 Stat. 1093, 47 U. S. C. A. § 402 (b) (Supp. 1938): "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

[5] Section 310 (b), supra, note 1.

[6] 67 F. (2d) 509, 62 App. D. C. 303, cert. denied, 290 U. S. 680.

[7] Sections 12 and 16, Act of February 23, 1927, 44 Stat. 1162, 1167, 1169, as amended, 46 Stat. 844.

the Pote case, it is clear that the Communications Act, as now phrased, contemplates an application, a hearing, if necessary, and a decision upon the basis of public interest, just as much in the case of an application for the transfer of an outstanding station license as in the case of an application for a proposed new station license. Moreover, the one application comes just as clearly within the contemplation of Section 402 (b) as the other. It follows that Columbia is an applicant for a radio station license whose application has been refused by the Commission and who, consequently, may appeal to this court under the provisions of Section 402 (b) (1). It follows, further, that Associated is a person who, under the provisions of Section 402 (b) (2), may invoke the jurisdiction of this court to determine whether it has been aggrieved, or its interests adversely affected, by the decision of the Commission,
refusing the application of Columbia. Whether it may
42 come also within the terms of Section 402 (b) (1) is unnecessary for us to determine. This court has jurisdiction to hear both appeals. The motions to dismiss, therefore, must be denied.

It is contended that as the Communications Act,[8] which was adopted after the decision in the Pote case, failed to make express provision for appeal from a refusal of an application for transfer of a station license, the rule of statutory construction is applicable, that where a statute is reenacted—after either an administrative or a judicial construction thereof—that fact constitutes evidence of Congressional intent to incorporate such construction into the reenactment. This, however, is not a conclusive presumption. As the Supreme Court has said, one decision construing an act does not approach the dignity of a well-settled interpretation.[9] And it has also said: "'A custom of the department, however long continued by successive officers, must yield to the positive language of the statute.'" [10] In our view—especially because of the language added to the statute as enacted in 1934—the presumption should not be indulged in this case.

To the extent that the decision in the Pote case may be in conflict with these conclusions, it is overruled.

Motions to dismiss denied.

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[8] Act of June 19, 1934, 48 Stat. 1064, 47 U. S. C. A., § 151 et seq. (Supp. 1938).

[9] United States v. Raynor, 302 U. S. 540, 551–552: "The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of Krakowski v. United States, 161 Fed. 88, held that the act only prohibited possession of the distinctive paper does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well-settled interpretation."

[10] See Lukens Steel Co. v. Perkins (No. 7368, decided October 3, 1939). — F. (2d) —, — App. D. C. —, and cases there cited. Compare the majority opinion of Mr. Justice Frankfurter with the dissenting opinion of Mr. Justice Roberts in Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd. (No. 38, decided November 22, 1939), — U. S. —.

Dissenting opinion

STEPHENS, Associate Justice: I dissent. The existence of a right of appeal is dependent upon Congressional intent. In Pote v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933), this court held that Section 16 of the Act of July 1, 1930, 46 Stat. 844, did not authorize an appeal from the refusal of an application for transfer of a station license. In the Communications Act of 1934, 48 Stat. 1064, 1093, Congress substantially re-enacted the provisions for appeals contained in the 1930 statute, except that it added language permitting an appeal from the refusal of an application for a construction permit. I think the law is well settled that re-enactment of a statute which has received a judicial construction will be presumed to be an adoption by the legislature of such construction. Latimer v. United States, 223 U. S. 501 (1912); Carroll Electric Co. v. Snelling, 62 F. (2d) 413 (C. C. A. 1st, 1932). Cf. Hecht v. Malley, 265 U. S. 144 (1924); Miller v. Maryland Casualty Co., 40 F. (2d) 463 (C. C. A. 2d, 1930); Kales v. Commissioner of Internal Revenue, 101 F. (2d) 35 (C. C. A. 6th, 1939). See 2 Sutherland, Statutory Construction (2d ed., 1904), § 403; 1 Paul & Mertens, Laws of Federal Income Taxation (1934), § 3.20.

The statement in United States v. Raynor, 302 U. S. 540 (1938), referred to in the majority opinion, that "One decision construing an act does not approach the dignity of a well settled interpretation," was made in respect of a single decision by a Federal court of appeals construing a statute which might come for interpretation before other courts of appeals. But where a single construction of a statute is necessarily conclusive, the proposition quoted
43 would not apply. In Seeberger v. Castro, 153 U. S. 32 (1894), certain language in the Tariff Act of 1883 had been construed by the Supreme Court. The same language, embodied in the Tariff Act of 1897, was the subject of interpretation in Latimer v. United States, supra. Concerning the effect of re-enactment after the prior construction, the Court in the Latimer case said, speaking through Mr. Justice Lamar:

"The words, having received such a construction under the act of 1883, must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court * * *" [223 U. S. at 504].

The United States Court of Appeals for the District of Columbia is the only court, except the Supreme Court, having appellate jurisdiction over the radio orders of the Communications Commission. Pote v. Federal Radio Commission was therefore a

conclusive construction of the 1930 act, petition for writ of certiorari having been denied by the Supreme Court (290 U. S. 680 (1933)).

I am aware that the presumption that reenactment of a statute after judicial construction will be deemed a legislative adoption of that construction is not conclusive. The presumption might be said not to arise if the judicial construction appears clearly to be wrong; but I think Pote v. Federal Radio Commission cannot be said to be clearly wrong. And reenactment of particular language after judicial construction thereof would not of course be persuasive that Congress had adopted the judicial construction if amendment of other portions of the statute has altered the meaning of the construed language. But I think that the requirement of Section 310 (b) of the Act of 1934, 48 Stat. 1064, 1086, that there should be no transfer of a station license unless the Commission shall "after securing full information decide that said transfer is in the public interest, and shall give its consent in writing"—Section 12 of the Radio Act of 1927, 44 Stat. 1162, 1167, having required merely the "consent in writing of the licensing authority"—is an amendment definitive of the duty of the Commission when passing upon applications for transfers and not one relevant to the right of appeal from a refusal to permit a transfer. And I disagree therefore with the point made by the majority that the change makes the Pote case no longer applicable.

I think the point made in the majority opinion that the Pote case is not controlling as to a transferor is not supportable. While it is true that that case involved a transferee only, the theory of the case was, as I read it, that the statute did not contemplate review of the Commission's refusal to allow a transfer, and this without respect to the question whether the application for transfer was made by the transferee alone or by both the transferor and the transferee. It is of no avail to treat a transferor as within Section 402 (b) (2), "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application" because, under the view that I take, the phrase "any such application," in its reference to applications, the refusal of which, under Section 402 (b) (1), is appealable, does not include an application for transfer. To treat an application for transfer as an application by the transferor "for modification of an existing radio station license" would strain the quoted words out of their normal meaning. A transferor seeking to divest himself of a license can hardly be said to be one seeking to modify it.

44 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion for reargument

Filed December 16, 1939

Now comes the Federal Communications Commission, appellee in the above-entitled cause and respectfully moves this Court for a reargument on appellee's Motion to Dismiss this Appeal. If this Motion is granted, it is further requested that such reargument by permitted before the entire membership of the Court.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.

45 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Statement in support of appellee's motion for reargument

Filed December 16, 1939

To the Honorable Chief Justice and the Associate Justices of the United States Court of Appeals for the District of Columbia:

It is respectfully submitted that the Court should permit a reargument of the Commission's Motion to Dismiss this appeal upon which a decision was rendered November 29, 1939. If such reargument is permitted it is further requested that such reargument be heard by the entire membership of the Court. In support of these requests it is respectfully submitted:

I. There is a sharp division of opinion among the members of this Court who have passed upon the question involved.

II. The Court's decision of November 29, 1939, is unsound.

I

THERE IS A SHARP DIVISION OF OPINION AMONG THE MEMBERS OF THIS COURT WHO HAVE PASSED UPON THE QUESTION INVOLVED

Prior to the Court's decision of November 29, 1939, on the Commission's Motion to Dismiss this appeal, the question raised by the Commission's motion had been considered and passed upon by the Court in the case of Pote v. Federal Radio Commission, 62

App. D. C. 303, 67 F. (2d) 509, cert. denied 296 U. S. 680. The Pote case was decided by a Court composed of former Chief Justices Robb, Van Orsdel, and Hitz, and the present Chief Justice Groner. The Court decided that under Section 16 of the Radio Act of 1927, as amended, no appeal to this Court could be taken from a refusal of the Commission to give consent to a transfer of a station license. Mr. Justice Groner dissented in the Pote case. In the decision of November 29, 1939, Chief Justice Groner, adhering to the view expressed in his dissenting opinion in the Pote case, and Associate Justice Miller held that under
46 Section 402 (b) of the Communications Act of 1934, as amended, an appeal to this Court could be taken from such a refusal, and overruled the Pote case. Associate Justice Stephens dissented. The language contained in Section 16 of the Radio Act of 1927, as amended, and the language contained in Section 402 (b) of the Communications Act of 1934, as amended, is precisely the same in regard to appeals from a refusal by the Commission to give consent to the transfer of a station license. Both statutes are silent on the subject.

Of the seven members of the Court, who have considered and passed upon the question raised by the Commission's Motion to Dismiss this appeal, five, namely, former Chief Justice Martin and former Associate Justices Robb, Van Orsdel, and Hitz and Associate Justice Stephens, have held to the view that no appeal to this Court lies from a refusal by the Commission to give its written consent to a transfer of radio station license. Only two members of this Court, namely, Chief Justice Groner and Associate Justice Miller, have ever advanced the view that such an appeal may be taken. Three members of this Court, namely, Associate Justices Edgerton, Vinson,[11] and Rutledge, have not directly passed upon the question raised by the Commission's Motion to Dismiss. In view of the difference in views of the judges now composing the Court, as well as the difference in views of some of the judges now composing the Court and those formerly composing the Court, the question of law presented by the filing of an appeal from an action of the Commission granting or refusing consent to transfer of radio station license, as well as from action of the Commission granting or refusing consent to the transfer of control of a licensee corporation [12] is shrouded in
47 doubt. In the present state of the law it is impossible to know with any degree of certainty whether an appeal to this Court will lie from action of the Commission in such cases because a determination of that question may vary, depending

[11] Associate Justice Vinson concurred in the opinion of Groner, C. J., in the case of The Crosley Corporation v. Federal Communications Commission, decided June 26, 1939, in which the Pote case was cited with approval.

[12] Section 310 (b) applies to transfer of control of licensee corporations as well as to assignment of station licenses.

upon the views of the two Associate Justices who are selected to sit with the Chief Justice in the case. If reargument of the instant case is permitted before the entire membership of the Court, the questions raised by the Commission's Motion to Dismiss in all pending appeals involving this same jurisdictional question can be finally determined in a manner which will remove the doubt as to the state of the law because of the patent differences in views of the judges of this Court who have expressed themselves on the subject.

The Commission is not unmindful that the statute creating this Court provides that it shall consist of one Chief Justice and two Associate Justices, and that the Chief Justice and any two Associate Justices may hear and decide any appeal from a decision of the Commission. We recognize also that in so far as the instant motion is concerned, a determination of whether reargument shall be permitted and, if so, whether such reargument shall be before the Chief Justice and the two Associate Justices who originally heard the case, or before the entire membership of the Court, lies in the sound discretion of the Court. We respectfully suggest, however, that this Court on many occasions has convened as a five-judge Court. Indeed, the Pote case was decided by a five-judge Court. It is submitted that because the jurisdictional question here involved has been twice decided by a divided Court, a different result being reached on each occasion, and because the views expressed by the justices of this Court on the question are irreconcilable, this is a case in which it is most appropriate for the Court, by its entire membership, to hear and authoritatively and finally determine the question.

48 THE COURT'S DECISION OF NOVEMBER 29, 1939, IS UNSOUND

(a) The plain language of Section 402 (b) (1) does not provide for an appeal from a refusal by the Commission to give written consent to the assignment of an existing radio station license. In this connection it may be pointed out that the language of Section 402 (b) (1) is meticulously drafted so as to draw a distinction between applications for renewal and modification of station license and applications for a radio station license, the word "existing" being used to modify the word "station license" in the case of an application for renewal or for modification, but the word "existing" being omitted when reference is made to applications for a radio station license. To attribute this significant difference in wording to inadvertence rather than design is at variance with established canons of statutory construction. A reading of Section 402 (b) (1), therefore, plainly indicates that provision is made for an appeal from an order of the Commission refusing an application for a new radio station license, or for re-

newal or modification of an *existing* station license, but no provision is made for appeal from an order refusing an application for an existing radio station license. It should also be noted that nowhere in the statute is provision made for the filing of an application for an existing radio station license—the procedure for obtaining such a license being covered only by the assignment section (310 (b)).

We do not believe the word "existing" can or should be read into Section 402 (b) (1) in so far as it relates to applications for station licenses, since it is obvious from a reading of the statute that the only provision which Congress made for the acquisition of an existing station license outstanding in the hands of a licensee was by way of an assignment of such license. An application for an existing radio station license is an anomoly under the statute. Provision is made for applications for new radio station license but not for existing radio station license. Considered in connection with Section 319 of the Act which requires a person to obtain a construction permit before constructing a new radio station, it is apparent that the intention of Congress in giving an applicant for station license a right to appeal to this Court from a refusal of his application was to afford a remedy to a person who, after lawfully constructing or acquiring a radio station for which no license is outstanding, is refused a license to operate such station. The appellant herein is not such a person. To suggest that there is no difference between an application by a person who, having constructed a station seeks a license to operate it, and a
49 request for consent to assignment of an existing radio station license is to emphasize accidental similarities in form to the exclusion of essential differences in substance.

(b) This Court, in the case of Pote v. Federal Radio Commission, 67 F. (2d) 509, 62 App. D. C. 303, cert. denied, 290 U. S. 680, construing Section 16 (a) (1) and (3) of the Radio Act of 1927, which was reenacted without any pertinent amendment so far as this case is concerned as Section 402 (b) (1) and (2) of the Communications Act,[13] reached the conclusion by a vote of four

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[13] For convenience these sections are set out below in parallel columns:

SEC. 16. (a) An appeal may be taken in the manner hereinafter provided from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:	SEC. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:
(1) By any applicant for a station license,	(1) By any applicant for a construction permit for a radio station, or for a radio station license,
or for renewal of an existing station license, or for modification of an existing statio license, whose application is refused by the Com-	or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.
(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by an decision of the Commission granting or refusing any such application or by any decision of the Commission revoking, modifying, or suspending an existing station license.	(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

to one that a proposed assignee of an existing radio station license is not an applicant for a radio station license within the meaning of said Section 16. Mr. Justice Groner alone dissented, taking the position that a proposed assignee of an existing radio station license was an applicant for a radio station license for the purpose of Section 16.

The facts of the Pote case, supra, disclosed a better reason for construing the provision in Section 16 of the Radio Act which permits an appeal from a refusal to grant an application for a radio station license as including the application of Pote for
50 involuntary assignment of the license of Station WLOE, than the facts of this case do for construing Section 402 (b) (1) as providing for the instant appeal. For, in that case Pote proposed to utilize physical equipment of a station, the licensee of which had been declared insolvent, no question of the necessity for a construction permit apparently being involved. In the case at bar Columbia did not file an application for a station license representing that it was going to utilize the equipment of a radio station which had been lawfully constructed, but for the operation of which no license was outstanding—it joined with Associated Broadcasters in requesting that the outstanding license of Associated Broadcasters be assigned to Columbia. Associated Broadcasters did not represent that it would abandon its license if written consent was not given to the requested assignment. The request made by Associated and joined in by Columbia was for the Commission to give its written consent to an assignment of the existing license. At all times it was represented to and recognized by the Commission that the transaction for which approval was sought was an assignment of an existing station license, not the grant of a new station license.

(c) The legislative history of Section 402 (b) (1) clearly demonstrates an intention on the part of Congress not to provide for an appeal under that section from a refusal on the part of the Commission to give its written consent to an assignment of an existing station license. Ordinarily, recourse to legislative history is had as an aid in interpreting a statutory provision only where there is patent ambiguity or uncertainty as to the meaning of the provision. Section 402 (b) (1) would not seem to require a recourse to the legislative history to construe its plain and unambiguous provisions. However, since the Court has interpreted the language of that section to mean something which the section does not say, it does not seem inappropriate to point to pertinent portions of the legislative history to show that Congress knew what the section said and intended it to mean no more that what it said.

51 Section 402 (b) (1) is, as pointed out above, a reenactment of Section 16 (a) (1) of the Radio Act of 1927. The

decision of this Court in the Pote case, supra, was handed down on May 2, 1933. At the next session of Congress the Radio Act of 1927 was repealed and the Communications Act of 1934 enacted in its stead. In reenacting the Radio Act of 1927 as a part of the Communications Act of 1934 the Congress made several amendments and changes in the law. In particular, with respect to the remedies provided by special appeal to this Court, several marked departures from the provisions of Section 16 of the Radio Act were made. In considering what changes should be made in this section the Congress had available not only the decision of this Court in the Pote case, supra, but had before it, in the then current annual report of the Federal Radio Commission, a discussion of that case [14] pointing out that four of the five justices of this Court had construed Section 16 (a) (1) of the Radio Act of 1927 as not providing for an appeal on the part of a proposed assignee from a refusal by the Federal Radio Commission to consent to a requested assignment of radio station license, and pointing out further that Mr. Justice Groner had dissented because in his view such a request was in substance and effect an application for a radio station license within the purview of Section 16 (a) (1) of the Radio Act of 1927. Knowing these facts the Congress nevertheless did not depart from the language of Section 16 (a) (1) which had been construed in the Pote case in enacting Section 402 (b) (1), nor did it elsewhere provide specifically for an appeal to this Court by a proposed assignee. It is of extreme significance that the only difference between Section 16 (a) (1) and Section 402 (b) (1) is that the latter makes explicit provision for an appeal to this Court from a refusal of an application for a construction permit for a radio station. Congress also curtailed the jurisdiction theretofore enjoyed by this Court under Section 16 to entertain appeals from orders of this Commission modifying radio station licenses, revoking such licenses, or suspending licenses when such orders were issued upon the Commission's own motion.

The Conference Report on the Bill which was enacted as the Communications Act of 1934 comments specifically about the changes in the appeal provisions of the statute, stating in effect that with respect to orders of the Commission in radio matters the only change intended was to permit resort to a three-judge District Court rather than to this Court for redress against certain orders which formerly could have been appealed to this
51 Court,[15] Few if any statutory reenactments have evidenced such painstaking care and attention not only to language

[14] 7th Annual Report, Federal Radio Commission, page 13.

[15] The Conference Report on the bill which was enacted as the Communications Act of 1934 contains the following statement explaining Section 402:

"The Senate bill (Section 402) for the purposes of cases involving carriers carries forward the existing method of review of orders of the Interstate Commerce Commission, and, in the main, for 'radio' cases *carries forward the existing method of*

but to the past history of the old statute as do the provisions of Section 402 (b) defining the class of Commission action subject to review by this Court on an appeal thereunder. It is difficult to understand how Congress could possibly have been more explicit in its desires and intentions with respect to its complete approval and ratification of the decision of this Court in the Pote case than by its action in the session following the Court's decision in that case. Certainly, it could not be expected that Congress would have written into the statute the words "provided, however, that an appeal shall not lie to this Court from a refusal by the Commission to give its consent to the transfer of a radio station license" in order that the statute might thereafter be interpreted as this court held it should be interpreted in the Pote case. If Congress wanted Section 402 (b) (1) to mean what this Court held the same language meant in Section 16 (a) (1) the best way to insure that result would seem to be to reenact it just as Congress did reenact it. It is respectfully submitted that if Section 402 (b) (1) is not sufficiently unambiguous and clear to permit of interpretation without resort to legislative history then resort to such history must be had, and such history conclusively demonstrates that Congress did not intend to provide for an appeal to this Court under Section 402 (b) (1) from a refusal to give written consent to the assignment of a license.

(d) The decision of this Court in the Pote case, supra, is conclusive in view of the fact that the Congress reenacted in the Communications Act of 1934 in haec verba the provisions of Section 16 which the Court had construed in the Pote case,
53 supra. We do not suggest that the presumption of intent which follows from a congressional reenactment of a statute after it has been construed by a court of competent jurisdiction is conclusive in every case. We do submit, however, that the rule does apply in the instant case. And we submit further, that if it does not apply in the instant case. The decision of this Court in the Pote case, supra, as is pointed out by Mr. Justice Stephens in his dissenting opinon in this case, was a decision by the only court which had jurisdiction to entertain an appeal under Section 16 of the Radio Act of 1927. It cannot be considered an "isolated" instance of judicial interpretation. The fact that for over six years no one resorted to this Court with a request that this question be reexamined argues for, not against, the conclusiveness of the decision in the Pote case, supra. Further, as is shown above, there is no necessity in this case in order to indulge the presumption of congressional

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review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission." [Italics supplied.] (73d Cong., 2d Sess. Report No. 1918.)

intent also to presume congressional knowledge of the Pote decision, for Congress had available to it not only the reported decision of the Court when it had under consideration the amendment of the Radio Act of 1927, but it actually had before it in the current annual report of the Radio Commission a discussion of the holding of the majority of the Court and of the lone dissent. Indeed, it would be rash under these circumstances to indulge a presumption that Congress did not know of and approve the interpretation placed by the majority of the Court in the language of Section 16 of the Radio Act of 1927, reenacted substantially in Section 402 (b) (1) of the Communications Act of 1934.

(e) There has been no departure from the provisions of the Radio Act of 1927 relating either to applications for radio station license or relating to assignment of licenses of a substantive or a procedural character which would justify a holding that under the Communications Act of 1934 a request for assignment of radio station license is, so far as the proposed assignee is concerned, an application for radio station license any more than a request for such assignment under the Radio Act of 1927 was an application for radio station license.

54 Set out in parallel columns for convenience are the applicable sections of the Radio Act of 1927 and the Communications Act of 1934 relating to assignment of station licenses:

Radio Act of 1927	Communications Act of 1934
SEC. 12 * * * The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involutarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.	SEC. 310 (b). The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

Underlined are the only changes of substance made in the statute.

It will be seen that Section 310 (b) provides that the Commission shall consider and act upon a transfer of control of a corporate

licensee in the same manner as on an assignment of radio station license or any right thereunder. In this very important, but for the purposes of this case irrelevant respect, it differs from the provisions of Section 12 of the Radio Act of 1927 which was silent with respect to transfer of control of corporate licensees. It also differs from Section 12 in that it requires in express terms that the Commission secure full information before it gives its consent either to a transfer of control or to an assignment of license. The addition of the words "public interest" in the section did no more than make explicit the standard which Congress had implicitly intended to be the basis for Commission action in assignment cases theretofore. This is definitely borne out by the Conference report on the bill which was enacted as the Communications Act of 1934. [16]

55 The addition of the requirement of Commission approval for transfer of control of corporate licensees obviously cannot be said to have any bearing on the question or whether a request for assignment of license so far as the proposed assignee is concerned is an application for station license (except possibly to the extent that it indicates a congressional belief that a transfer of control of a corporate licensee should be governed by the same considerations as govern assignment of license, and quite obviously a transfer of control of a corporate licensee which may consist either of an acquisition of control by a particular individual or a divestment of control by a particular individual in such a manner that no other person acquires control, cannot be analogized on any theory an assignment of license or a transfer of control of the licensee corporation unless it shall have secured full information is no more than a congressional order to the Commission not to consent to any assignment or transfer of control in the absence of complete information concerning the transaction. It may be, as the Court suggested, that in some cases a hearing must be held to secure full information. It cannot be asserted on any logical basis, however, that because the Commission must know what it is doing before it gives its consent to an assignment of license the proposed assignee is, therefore, an applicant for a radio station license any more than or any less than he would be an applicant for a radio station license if the Commission were permitted to act upon partial instead of full information.

56 (f) The result which would be reached in the instant case by following the decision in the Pote case is a sensible re-

[16] The Conference report on the bill which was enacted as the Communications Act of 1934 contains the following statement explaining Section 310 (b):
"SEC. 310 (b) is substantially Section 12 of the Radio Act modified as proposed by H. R. 7716. The section relates to transfer of radio licenses. As in H. R. 7716 the authority to approve or disapprove such transfers is extended to cover transfer of stock control in a licensee corporation. The present law is also modified to require the Commission to secure full information before reaching decision of such transfers" (73d Cong., 2d Sess., Report No. 1918).

sult. Without adverting to the propriety of characterizing a result which must follow if the considered opinion of five out of the seven Justices of this Court who have addressed themselves to the question is to be given appropriate weight as not being a "sensible result" it is respectfully submitted that the characterization is an inaccurate one and that such result is a sensible one.

Whether the view be taken that a licensee of a radio-broadcasting station has a statutory right to alienate his rights under the license and to obtain written consent from the Commission to any proposed alienation not in violation of the statute, or whether the view be taken that no such right is conferred by the Communications Act of 1934, the result reached by following the majority opinion in the Pote case is not such an absurd result as to warrant this Court in refusing to follow the plain and explicit language of Section 402 (b) (1) of the Act.

If the assumption be made that a licensee has a statutory right to alienate rights under his license, the violation of which may be redressed in a judicial tribunal, it does not follow that the Congress is constrained to provide the same forum for the vindication of such right as is provided for the adjudication of invasions of rights which may flow from a denial by the Commission of applications for radio station license. If it be assumed that a proposed assignee is given a statutory right to resort to a judicial tribunal to vindicate his right in a case in which the Commission has refused to permit an assignment to him, the Congress is certainly free to permit him to redress his grievance in a court other than the court designated to entertain special appeals from a denial of an application for radio station license.

That Congress did not intend to make this Court the only tribunal in which rights invaded by actions of the Commissioners in radio matters may be remedied is plain. Whether the plan of the statute in this regard is a "sensible" one may be open to difference of opinion. It may be argued, for example, that Congress should have provided that a person whose legal or equitable
57 rights are invaded by an order of the Commission modifying an existing radio station license should be able to resort to this Court by appeal whether such order of modification was entered on the Commission's own motion or in connection with an application therefor filed by a station licensee. With equal force it might be argued that Congress should provide for resort to a three-judge District Court rather than an appeal to this Court as the remedy for such a person in either case. It cannot be argued, however, that Congress did so provide, for it is clear that the remedy is by appeal to this Court if the order was entered on an application for modification filed by the licensee and is by suit in a three-judge district court if the order was entered on the Com-

mission's own motion, despite the fact that the effect upon the aggrieved person is precisely the same whatever the predicate for the Commission's order might have been.

It will be seen, therefore, that even in cases where precisely the same injury flows in precisely the same way to precisely the same person from an order of the Commission modifying a radio station license the tribunal to which resort may be had to redress the grievance depends upon whether the Commission's order of modification was entered on its own motion or pursuant to an application filed by the licensee. Whether this court would consider the procedure prescribed by Congress in the Communications Act in such cases a sensible one or not, in view of the statement in the Court's opinion of December 29, is doubtful. There can be no doubt, however, that "sensible" or not, the power of Congress to prescribe these different procedures is not open to question.

If a proposed assignor or assignee of a radio station license has a right to bring an action against the Commissioners for a refusal to give written consent to the proposed assignment, the fact that Congress might have provided a remedy by appeal to this Court rather than by resort to a three-judge District Court or to some other appropriate tribunal, but did not, may be regrettable. But however regrettable it may be, this Court has no authority to remedy the situation through the process of amending by judicial fiat the provisions of Section 402 (b) (1). Considerations of whether procedure by appeal to this Court is a more sensible remedy than a suit in some other tribunal are legislative matters outside the province of this Court.

58 If, on the other hand, no right exists in either the proposed assignor or proposed assignee to a judicial remedy in the event of Commission refusal to consent to a proposed transfer, it would certainly not be sensible to provide for an appeal to this or any other Court from such refusal. Nor can it be said that it is beyond the power of the Congress to create a right in an applicant for a radio station license to invoke the judicial process to prevent an unlawful denial of his application by the Commission and at the same time fail to vest in a licensee any right to alienate his license or any right in a proposed assignee to obtain an assignment of such license, on the theory that this would not be a "sensible" result. There are considerations which might well move the Congress to create rights in the one case and refuse them in the other. So far as the public is concerned, a refusal on the part of the Congress to permit alienation of radio station licenses or rights thereunder is of far less importance than a refusal on the part of Congress to provide for resort to the courts in the event of a Commission refusal to issue

a radio station license where such issuance will serve public interest, convenience, or necessity. To the public a refusal to permit an assignment of license means merely that the existing licensee will continue to render a broadcast service in the public interest. A refusal to grant an application for radio station license, however, may mean that the public will be deprived of broadcast service. This difference is certainly substantial enough to justify Congress treating the two situations differently.

(g) The interpretation which this Court has placed upon Section 310 (b) in its decision of November 29, 1939, has the effect of writing out of the Act either the provisions of Section 310 (b), or the provisions of Sections 307, 308, and 309 relating to applications for radio station license. For if a proposed assignee of an existing radio station license is the same as an applicant for a radio station license then, since Sections 307, 308, and 309 cover in detail the procedure for handling and acting upon applications for radio station license, either Section 310 (b) or Sections 307, 308, or 309 are surplusage. If, in substance and effect,
59 an assignment of an existing station license is the same as an application by the proposed assignee for a radio station license, why should Congress have included Section 310 (b) in the Act, since Sections 307, 308, and 309 adequately provide for the handling of such applications? Either an assignment of license is something different from an application by the proposed assignee for a station license or Congress has been guilty not merely of redundancy but of prescribing two different and apparently mandatory procedures for the handling of the same subject matter. Such a result we submit is not a sensible one.

Analysis is a useful tool in a solution of problems but the technique for its use must guard against excision of an essential element in the process of eliminating irrelevant factors. This Court in analyzing a request for written consent of the Commission to an assignment of license into its components lost sight of the essence of the matter. A transaction for which Commission approval under Section 310 (b) of the Act is required is primarily one looking to the transfer, disposition of, or assignment of a license or a right therein or of control of a licensee corporation. It is not in substance, nor does it involve essentially the same element of, an application for a radio station license.

On the following page there is set out in tabular form some of the differences between the statutory provisions governing assignments of license and those governing applications for radio station license.

60 The following comparison of Sections 308 and 309, governing applications for station license and Section 310 (b) governing assignment of existing station license will show the essential difference in the statutory scheme relating to these two classes of cases.

	Under Sections 308 and 309, relating to applications for station license	Under Section 310 (b), relating to assignment of existing station license
Applicant	The person desiring to obtain station license.	No statutory provision made for filing application.
Form of application	Must be written	No statutory provision made for filing application.
Standard applied	Whether "public interest, convenience or necessity would be served."	Whether "transfer is in the public interest."
Procedure	Application cannot be denied without giving applicant notice and opportunity to be heard.	Consent can be refused without giving proposed assignor or assignee notice and opportunity to be heard.
Statutory duty on commission.	Commission "shall" grant if "public interest, convenience or necessity would be served."	No duty on Commission to grant; language is prohibitory; Commission's duty is not to give consent unless it secures full information.
Statutory right	Statutory right to license invaded if Commission improperly refuses to grant application, and appeal specifically provided under Section 402 (b) (1).	No statutory right to appeal under Section 402 (b) (1) from refusal to consent to assignment given either to assignor or assignee.
Similar or related matters under statutory provisions.	Sections 308 and 309 also deal with applications for renewal and modification of license, the latter also being expressly covered by Section 402 (b).	Sec. 310 (b) also deals with transfer of control of licensee corporation which, likewise, is not covered by Section 402 (b).

61

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant a reargument of the Commission's Motion to Dismiss, and that such reargument should be heard and the Motion determined by the entire membership of the Court.

Wherefore, it is respectfully prayed that this Court grant a reargument of the Commission's Motion to Dismiss, and it is prayed further, that such reargument be heard and the Motion determined by the entire membership of the Court.

Respectfully submitted,

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.
WILLIAM C. KOPLOVITZ,
William C. Koplovitz,
Assistant General Counsel.

AFFIDAVIT OF SERVICE

CITY OF WASHINGTON,
District of Columbia, ss:

William J. Dempsey, being first duly sworn, deposes and says that he is the General Counsel of the Federal Communications Commission, herein; that he has today forwarded by registered mail, postpaid, to Duke M. Patrick, Colorado Building, Washington, D. C., attorney for Columbia Broadcasting System of California, Inc., a true and correct copy of the attached Motion for Reargument and Statement in Support Thereof.

WILLIAM J. DEMPSEY.

Subscribed and sworn to before me this 16th day of December 1939.

STEPHEN TUHY, Jr.,
Notary Public.

62 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order denying motion for reargument

January 2, 1940

On consideration of the Commission's motion for reargument, it is ordered by the Court that the motion be, and it is hereby, denied.

63 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion for extension of time within which to prepare and file record pursuant to rule 32

Filed January 4, 1940

Now comes the appellant in the above-entitled cause and represents to this Honorable Court as follows:

1. That counsel for the appellant is informed and upon information and belief alleges that it will be possible for the parties to prepare and file an agreed statement of the case pursuant to paragraph 4 of Rule 32 of the rules of this Court.

2. That the time required for the preparation and filing of such an agreed statement or the preparation of material required to be filed by appellant under paragraph 3 of Rule 32 will not exceed a period of twenty days.

Wherefore, the premises considered, it is respectfully prayed that this Court enter its order:

1. Granting appellant a period of twenty days from January 2, 1940, within which to prepare and file an agreed statement of the case pursuant to paragraph 4 of Rule 32, and

2. Granting appellant a period of twenty days from January 2, 1940, within which to prepare and file the material required by paragraph 3 of Rule 32 in the event that an agreed statement of the case cannot be prepared.

Respectfully submitted.

D. M. PATRICK,
Attorney for Appellant.

PROOF OF SERVICE

Service of the foregoing motion and a true copy received this 4th day of January 1940.

FEDERAL COMMUNICATIONS COMMISSION,
By WILLIAM J. DEMPSEY.

64 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Motion to suspend further proceedings pending Supreme Court action on appellee's proposed petition for writ of certiorari

Filed January 10, 1940

Comes now the Federal Communications Commission, appellee in the above-entitled cause, and moves this Honorable Court to suspend all further proceedings on this appeal for thirty days pending final disposition by the Supreme Court of the United States of the Commission's proposed petition for writ of certiorari for review of this Court's judgment denying the Commission's motion to dismiss the instant appeal, and in support of this motion points out the following:

1. On November 29, 1939, the Commission's motion to dismiss this appeal was denied by this Court.

2. On January 2, 1940, the Commission's motion for reargument of said motion to dismiss was denied by this Court.

3. In view of the importance of the jurisdictional question involved in this appeal, the Commission proposes to file forthwith in the Supreme Court of the United States a petition for writ of certiorari to review the judgment of this Court denying the Commission's motion to dismiss this appeal.

4. Said proposed petition is now in the process of preparation and will be filed at the earliest possible date.

5. If the Supreme Court grants said petition and reverses the aforesaid judgment of this Court, a consideration by this Court of the merits of this appeal while such petition and review are pending, as well as the procedural steps required on behalf of the parties in connection with the filing of the record and briefs, and oral argument, will obviously have been rendered unnecessary and there will have occurred a needless expenditure of time and money by the Court and the parties.

65 Wherefore, it is respectfully requested that this Court suspend all further proceedings on this appeal for thirty days pending final determination by the Supreme Court of the United States of the Commission's proposed petition for writ of certiorari to review the aforesaid judgment of this Court denying the Commission's motion to dismiss this appeal.

FEDERAL COMMUNICATIONS COMMISSION,
By (Signed) WILLIAM J. DEMPSEY,
William J. Dempsey,
General Counsel.
(Signed) WILLIAM C. KOPLOVITZ,
William C. Koplovitz,
Assistant General Counsel.
B. P. COTTONE,
Benedict P. Cottone,
Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing "Motion to Suspend Further Proceedings Pending Supreme Court Action on Appellee's Proposed Petition for Writ of Certiorari" acknowledged and a true copy thereof received this 9th day of January 1940.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.,
By D. M. PATRICK,
Duke M. Patrick,
Attorney for Appellant.

66 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Order suspending further proceedings

Filed Jan. 27, 1940

On consideration of appellee's motion filed herein on January 10, 1940, and it appearing that appellee proposes to file in the Supreme Court a petition for writ of certiorari in this cause, it is ordered that further proceedings in this cause be, and they are hereby, suspended for thirty days from January 10, 1940.

Dated January 27, 1940.

Per Curiam.

A true Copy,
Test:

[SEAL] JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

67 In United States Court of Appeals for the District of Columbia

[Title omitted.]
[File endorsement omitted.]

Designation of record

Filed Feb. 15, 1940

The clerk will please prepare a transcript on application to the Supreme Court of the United States for certiorari in the above-entitled cause, including therein the following:

1. Appellant's Notice of Appeal and Statement of Reasons Therefor filed on November 12, 1938.
2. Commission's Statement of Facts, Grounds for Decision, and Order filed December 12, 1938.
3. Commission's Motion to Dismiss filed December 14, 1938.
4. Appellant's Opposition to Motion to Dismiss filed December 16, 1938.
5. Commission's Reply to Appellant's Opposition to Motion to Dismiss filed December 19, 1938.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

THE ASSOCIATED BROADCASTERS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

6. Minute entry of December 29, 1938, evidencing action of this Court granting Appellant's Motion to Hold in Abeyance Designation of Record until Action on Motion to Dismiss.

7. Docket entry of February 4, 1939, assigning Motion to Dismiss for argument on March calendar.

8. Minute entry of February 20, 1939, setting Motion to Dismiss for argument on March 7, 1939.

68 9. This Court's opinion in the above-entitled cause denying Commission's Motion to Dismiss rendered November 29, 1939.

10. Appellant's Motion for Determination of Jurisdictional Question Prior to Consideration of Cause upon the Merits filed on December 16, 1939.

11. Commission's Motion for Reargument filed on December 16, 1939.

12. Minute entry of January 2, 1940, denying Commission's Motion for Reargument.

13. Appellant's Motion for Extension of Time within which to Prepare and File Record filed January 4, 1940.

14. Commission's Motion to Suspend Further Proceedings Pending Supreme Court Action filed on January 9, 1940.

15. Order of Court suspending further proceedings for 30 days from January 10, 1940, filed on January 27, 1940.

16. This designation.

FRANCIS BIDDLE,
Francis Biddle,
Solicitor General.

Service of copy of Designation of Record acknowledged this 13th day of February 1940.

D. M. PATRICK,
Counsel for Columbia Broadcasting System of California, Inc.

69 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1940

Supreme Court of the United States

Order allowing certiorari

Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

240094—40

U. S. GOVERNMENT PRINTING OFFICE: 1940